

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAVID E. NELSON)	
Claimant)	
VS.)	
)	Docket No. 163,977
CHECKERS FOODS)	
Respondent)	
AND)	
)	
TRAVELERS INSURANCE COMPANY)	
Insurance Carrier)	
<hr style="width: 40%; margin-left: 0;"/>		
VS.)	
)	
SPANGLES, INC.)	
Respondent)	Docket No. 165,778
AND)	
)	
FIDELITY & CASUALTY COMPANY)	
Insurance Carrier)	

ORDER

ON the 28th day of April, 1994, the application of the respondents and insurance carriers for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Shannon S. Krysl, dated February 3, 1994, came on before the Appeals Board for oral argument.

APPEARANCES

The claimant appeared by and through his attorney Paul Hogan of Wichita, Kansas. The respondent Checkers and its insurance carrier Travelers Insurance Company appeared by and through their attorney Lyndon W. Vix of Wichita, Kansas. The respondent Spangles, Inc. and its insurance carrier Fidelity and Casualty Company appeared by and through their attorney J. Philip Davidson of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney John C. Nodgaard of Wichita, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board is the same as that set forth in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations of the parties are the same as those set forth in the Award of the Administrative Law Judge. In addition, the parties announced that the Workers Compensation Fund had stipulated to eighty percent (80%) of the liability assessed to the respondent Spangles, Inc. and its insurance carrier.

ISSUES

The administrative law judge found that claimant was entitled to benefits based upon an eight percent (8%) permanent partial general body disability for a work related injury that occurred at Checkers on or about February 19, 1992 and each work day thereafter until claimant's termination on February 29, 1992. The Administrative Law Judge also found that claimant experienced personal injury by accident while working for Spangles, Inc. on March 28, 1992 that temporarily aggravated his pre-existing low back condition. Both respondents and insurance carriers have requested the Appeals Board to review these proceedings. The issues now before the Appeals Board are:

(1) Whether the Administrative Law Judge erred in considering the transcripts of preliminary hearings when their admissibility was not addressed at the time that stipulations were taken.

(2) Whether claimant met with personal injury by accident arising out of and in the course of his employment with the respondent Checkers.

(3) Whether claimant met with personal injury by accident arising out of and in the course of his employment with the respondent Spangles, Inc.

(4) Nature and extent of disability, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record, the Appeals Board finds, as follows:

(1) The Administrative Law Judge was correct in considering the transcripts of the preliminary hearings when their admissibility was not addressed at the time that stipulations were taken.

K.S.A. 44-552 requires, unless waived by mutual agreement, a certified shorthand reporter to attend each hearing where testimony is introduced and preserve a complete record of the evidence introduced. Any transcript prepared and duly certified under the provisions of said statute shall be received as evidence in the proceeding. In addition, Director Rule 51-3-5 states that the parties' submission letters shall contain a list of the evidence to be considered by the Administrative Law Judge, and that list shall include the dates and name of the Administrative Law Judge for each hearing held.

This decision is limited to those situations where the parties, at the time of taking stipulations, failed to discuss the admissibility of the transcripts of preliminary hearings. Also, the finding in this proceeding is limited to the testimony presented at the preliminary hearings. Medical reports or other hearsay evidence may not be considered as evidence when the Administrative Law Judge makes a final award in the case unless all parties stipulate to them or unless they are later supported by the testimony of the physician, surgeon or other person making the report, record or statement. See Director Rule 51-3-5a.

(2) Claimant is entitled to an award against the respondent Checkers and its insurance carrier Travelers Insurance Company for an eight percent (8%) permanent partial general body disability as a result of his work related accident of February 19, 1992 and any increased injury incurred as a result of his lifting activities up through and including his last day of employment with Checkers on February 29, 1992. The award of Administrative Law Judge Shannon S. Krysl dated February 3, 1994, should be affirmed in all respects.

On February 19, 1992, claimant was working as a night stocker at Checkers. On this date claimant sustained injury when he turned and ran into a door knob which struck him in the right inguinal area causing pain and numbness in the right thigh and low back pain. After the initial incident, claimant symptoms progressively worsened until he was terminated on February 29, 1992. Claimant then applied for and was hired as a cook and general maintenance worker at Spangles. Claimant began work at Spangles on March 3, 1992 and terminated on April 2, 1992, upon the advice of his physician. While working for Spangles, claimant would experience intense low back pain whenever he would lift any item of significant weight.

The claimant was sent to board certified orthopedic surgeon, Robert Rawcliffe, M.D. for an independent medical examination on June 2, 1992. Dr. Rawcliffe took a complete history from the claimant, conducted a medical examination, and reviewed a CT scan that had been taken in March. Dr. Rawcliffe diagnosed a contusion of the femoral nerve in the inguinal area, based upon the door knob incident of February 19, 1992. Regarding the symptomatology claimant experienced while working for Spangles, Inc., Dr. Rawcliffe believes that claimant sustained some degree of lumbar sprain or strain of a temporary nature as the increased symptomatology returned to its original level of intensity. Although the CT scan indicated disc protrusion at the L4-5 intervertebral level and disc herniation at the L5-S1 level, there was no objective evidence on the physical exam to verify those findings. Dr. Rawcliffe believes that no permanent restrictions are needed due to the alleged accidental injuries at either Checkers or Spangles, and that claimant has no permanent impairment of function resulting from the alleged injuries. The doctor believes claimant's current symptoms relate to the injury at Checkers and not to activities at Spangles, Inc.

The claimant was seen by board certified orthopedic surgeon, Robert L. Eyster, M.D., on July 16, 1992. Dr. Eyster's initial diagnosis was degenerative disc disease. As he could not totally correlate the disc disease with claimant's injuries and subjective complaints, the doctor felt an MRI study was in order. On July 21, 1991, an MRI evaluation was performed which indicated degenerative disc disease with herniation at L4-L5 and L5-S1. Based upon the history that claimant had experienced pain every day since the original injury at Checkers and claimant's opinion that he felt that he had only a temporary aggravation of symptoms at Spangles, Dr. Eyster opined that claimant had degenerative disc disease that was aggravated by his work at Checkers and in the same fashion by his work at Spangles, Inc. However, Dr. Eyster does not believe the work at Spangles, Inc. caused any increase of actual impairment or permanent injury. Dr. Eyster feels the work at Spangles, Inc. caused temporary aggravation of symptomatology, at

best. Due to the degenerative disc disease, Dr. Eyster feels that claimant has an eight percent (8%) permanent partial impairment of function to the body as a whole.

The Appeals Board finds that claimant has experienced an aggravation of his pre-existing degenerative disc disease as a result of the incident on February 19, 1992, and his work activities at Checkers up through and including the date of termination of February 29, 1992. The Appeals Board finds the opinions of Dr. Eyster to be persuasive as he had an opportunity to observe claimant on more than one occasion and had the benefit of the MRI evaluation. Therefore, claimant is entitled to permanent partial general body disability benefits based upon this eight percent (8%) rating.

(3) As indicated above, any injury sustained by claimant while working for Spangles, Inc. was temporary in nature. As a result, claimant is not entitled to receive permanent partial disability benefits from the respondent Spangles, Inc. or its insurance carrier Travelers Insurance Company, Inc.

(4) Under the provisions of K.S.A. 44-510e, claimant is entitled to permanent partial general disability benefits based upon his functional impairment rating or his work disability, if greater. As no evidence was introduced regarding potential work disability, claimant is entitled to his permanent partial disability benefits based upon the functional impairment rating of eight percent (8%).

(5) The findings and conclusions of Administrative Law Judge Shannon S. Krysl as set forth in her award of February 3, 1994, are adopted to the extent they are not inconsistent with the specific findings and conclusions expressed herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl dated February 3, 1994, should be, and hereby is, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of September, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Paul Hogan, Attorney at Law, 1333 N. Broadway, Wichita, KS 67214
Lyndon W. Vix, Attorney at Law, 126 N. Market, Suite 1600, Wichita, KS 67202
J. Philip Davidson, Attorney at Law, 301 N. Main, Wichita, KS 67202
John C. Nodgaard, Attorney at Law, 300 W. Douglas, Wichita, KS 67202
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director